



POLICE DEPARTMENT

March 9, 2010

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Steven Owens
Tax Registry No. 933135
75 Precinct
Disciplinary Case No. 84982/09

Police Officer Jonathan Joyner
Tax Registry No. 935084
75 Precinct
Disciplinary Case No. 84984/09

The above-member member of the Department appeared before the court on
February 2, 2010, charged with the following:

Disciplinary Case No. 84982/09

1. Said Police Officer Steven Owens, while on-duty and assigned to the 75th Precinct, on or about January 26, 2008, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Officer improperly discharged five (5) rounds of his on-duty Smith and Wesson semi-automatic, Model # 5946, at a moving vehicle.

P.G. 203-12, Page 1, Paragraph 1(G) – DEADLY PHYSICAL FORCE
GENERAL REGULATIONS

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT- PROHIBITED
CONDUCT GENERAL REGULATIONS

Disciplinary Case No. 84984/09

1. Said Police Officer Jonathan Joyner, while on-duty and assigned to the 75th Precinct, on or about January 26, 2008, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Officer improperly

discharged four (4) rounds of his on-duty 9MM Automatic Glock, Model #19, at a moving vehicle.

P.G. 203-12, Page 1, Paragraph 1(G) – DEADLY PHYSICAL FORCE
GENERAL REGULATIONS

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED
CONDUCT GENERAL REGULATIONS

The Department was represented by Pamela Naples, Esq., Department Advocate's Office and the Respondents were represented by Stephen C. Worth, Esq.

The Respondents, through their counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondents are found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Captain Timothy Trainor.

Captain Timothy Trainor

Trainor has been with the Department for almost 19 years and he is currently the Commanding Officer of the Brooklyn North Investigations Unit where he has been for seven and a half years. He is charged with the oversight of internal actions and of personnel assigned to Patrol Borough Brooklyn North. He is in charge of a unit that investigates allegations of misconduct not rising to the level that would require an investigation by the Internal Affairs Bureau (IAB). The unit also does patrol monitoring

and performs quality assurance checks and balances. He is also responsible for the investigation of firearm discharges by members of the service that occur in the confines of Patrol Borough Brooklyn North.

Trainor has conducted about 215 such firearm discharge investigations. His role is to investigate these instances and report to the Chief of Department's Firearms Discharge Review Board.

Trainor testified that when a member of the service discharges his weapon, normally the patrol supervisor responds immediately. Based on the nature of the circumstances they would notify the duty captain and IAB would be notified. Additionally, the duty inspector is required to respond, as well as Detective Bureau members assigned to Trainor's unit, and other support units such as the Technical Assistance Response Unit (TARU), if necessary.

Trainor indicated that when the duty captain arrives, depending on the type of shooting it is and who was struck, a shooting team is comprised on an ad hoc basis. The shooting team, he testified, is lead by the duty captain, if he is a designated shooting team leader. If none of the designated shooting team leaders are available, one would be activated off-duty, such as himself, if the shooting involves a member of the service that strikes another human being. "It's also comprised of members assigned to Crime Scene Unit, the detectives, Internal Affairs, you have the Emergency Service personnel like I said support units such as TARU and any other unit necessary to assist in a complete investigation."

Trainor further testified that the shooting team leader is ultimately responsible for the completion of a preliminary investigation on the day of the shooting. He clarified that

the preliminary investigation is a summation of the total investigation up to that point for the day and that usually includes canvasses, the results of canvasses, interviews of civilian and uniformed members of the service, review of the crime scene investigation and recap. The primary responsibility of the shooting team leader on that day is to prepare and complete a firearm discharge report which, he testified, is a standardized 28-paragraph report which is forwarded to the Chief of Department on every single firearm discharge by a member of the service.

Trainor stated that when the shooting team leader arrives that person would ascertain who the ranking member of the service at the scene is and get debriefed on the circumstances known up to that point. The shooting team leader would, he said, assume command and ensure that a crime scene has been established properly. "They will now attempt to identify witnesses, will also attempt to identify involved members of service, both members that have discharged their weapons or witness officers who might have been part and parcel to the actual to the discharge and also responding members of the service that might help in the investigation."

When there is no further investigative value from being at the scene, the investigation is moved back to the precinct of occurrence, Trainor testified, where the investigation continues on an administrative level. That, he said, entails formal interviews of members of the service and recapitulations of interviews done either by IAB or the detective squad. It also entails performing background checks and putting it all together and "making a preliminary recommendation if one can be made."

He said that different factors are considered when deciding who to interview. He said "the most paramount" interviews involve members of the service who discharge

their weapons and he needs clearance from the district attorney to conduct them. This, he said, helps the district attorney to review the matter and prevents the Department from overstepping its bounds. He indicated that duty status is determined on a case by case basis depending on the circumstances, and a recommendation is made as to whether the shooting is inside or outside of Department guidelines.

At this point the Court directed that the questioning address the case at hand.

Trainor testified that on January 26, 2008 he was notified by telephone, at home, on his regular day off, that a firearm discharge had occurred in Brooklyn North. Trainor said he did not respond on the day of occurrence because it did not meet the protocols for him to respond, explaining: "there was a shooting team leader on duty and working at that time that was Captain Patti. There was no human struck as a result of their discharge and I was not required to come in." He said that he was in continual contact and he was kept apprised of the progress in the investigation. Trainor was off the next day, a Sunday, and he came to work on Monday and reviewed the case with his staff.

On questioning by the Court, Trainor agreed that he came to the conclusion that the shooting was outside of guidelines. When asked what the basis for that conclusion was Trainor testified:

Based on my investigation I determined that the involved officers, Officers Joyner and Owens¹, that they were in violation of Patrol Guide, the Patrol Guide 203.08 subsection G which prohibited the officers from discharging their weapon at or from a moving vehicle if other less than deadly physical force or with physical force other than the moving vehicles be used. I made the determination based on statements and investigation they did not prove to me that there was in fact a weapon present in the vehicle when they discharged their firearms.

¹ Officers Joyner and Owens are the Respondents in the present case.

Trainor further testified that no gun nor was anything resembling a gun found.

When the officers were interviewed, Trainor said, they were asked to go into as much detail as they could about what observations they had made. For instance, when Respondent Joyner had stated that he thought the driver of the vehicle was "bluffing," he asked him to go into detail regarding what he had actually seen. He said that, to the best he can recall, the officer stated the he did not actually see a firearm.

He asked the Respondents to go into detail about the actions of the perpetrator, who they asserted they were discharging their weapons at, and to take him through the events as they recall them. They made, Trainor said, "statements that didn't lead up to the level of that an officer should have known, they didn't take that extra step to determine if a firearm was in fact in the car."

He also said he based his determination "on the immediacy of the need for them to take their actions their positioning in the street relative to the perpetrator and to the vehicle." He said there were many things "we" took into account considering whether the officers should have discharged their weapons. Trainor testified:

It wasn't just was there a firearm in the car it was we took into a lot account the responsibility of a police officer to make an assessment prior to discharging the firearm their positioning, their danger, whether they had cover or concealment, these were things that we had all taken into account in this recreation of events based on their testimony and other investigative findings.

He recalled that after the Respondents' RMP (radio motor patrol vehicle) was struck, Respondent Joyner was unable to get out from his driver's side door. Respondent Owens had exited the passenger side and took a position in the rear. Respondent Joyner, he said, went to the front of the RMP initially to try to extract the driver of the suspect

vehicle, a Dodge Neon.² Then he moved onto the sidewalk, and then went to the rear of the RMP. What was important to “our” investigation, he said, was that both of the Respondents and other officers at the scene had made clear that the vehicle was rocking back and forth because it was stuck between a parked blue van and had been wedged sideways alongside the RMP:

...and this Neon was and was the officers’ own testimony, that it was screeching its tires and it was rocking. Their own testimony was that they perceived it was trying to force its way through after being immobilized and during the officers’ testimony they stated that Officer Joyner specifically stated that he put himself in a position after initially diving you know his words were diving out of the RMP going to the passenger side and he puts himself to the front of the -- he put himself directly in the path of this vehicle had taken a stance that he had said was a police stance which we interpret to be a weaver stance.”

The Court asked what a weaver stance was and Trainor responded:

Weaver stance, two hands supporting the gun. They are trained in the academy. The officer had stated that he had given repeated verbal commands, ‘Police. Don’t move. Get out of the vehicle.’ It was Officer Joyner’s recollection of the events that the vehicle started to continue now to move more towards him and at some point the vehicle breaks free and the officer now states that he dives in a quote unquote superman style behind the RMP and now gets up to an immediate crouching position and as the vehicle was turning he discharges his weapon towards the left side of the vehicle. On crime scene examination there were no [bullet] impacts into the front of the vehicle the front glass, the windshield. All of the impacts were on the left side of the vehicle on and the rear.

When asked what conclusions he was able to draw from this information, Trainor testified:

In reviewing the crime scene sketch and the officers’ testimony and the impacts as well as the officers’ own testimony about where they were positioned in reviewing the crime scene sketch we were able to

² Subsequent testimony clarifies that the front of the RMP was approximately at the Neon’s driver’s side door.

determine that the officers by being behind the RMP they were clearly in a zone of safety. They could not have been struck by the vehicle if it freed itself from the position it was in. The vehicle was going to proceed north bound on Vermont and they were in a position that they would not have been struck. Even when Officer Joyner dives superman style into this zone of safety so they discharged their weapon in an eastbound direction towards the left side of the vehicle. We went into detail in their interview about what they were shooting at. The officers maintained they were shooting at the center mass at the driver's side door. Ballistic examination suggested that we have an impact on the left wheel which was flattened, we also have two impacts in the rear left wheel and we also have an impact in the rear left length [should read "*lens*"] of the Dodge Neon.

Trainor noted that there was no ballistic evidence that there were any shots at the front of the vehicle.

At this point, a diagram of the scene, which was prepared by the Crime Scene Unit, was received in evidence as Department Exhibit (DX) 1. Trainor explained that this was used during the interviews to help understand the incident. Pointing to the diagram Trainor identified the RMP, which was facing south, the silver Dodge Neon and the blue van. He noted that the diagram showed the original position of the van as well as the position after it was moved about 8 to 12 inches up on the curb by the Neon. Trainor put an "N" on the Neon.

Trainor explained that the Respondent had stated that they had travelled south on Vermont Street and had taken a position to see if they could aid in the apprehension of the vehicle. The Respondents indicated that the Neon had travelled west on Dumont Avenue and had turned at the corner of Vermont Street traveling north. They said the vehicle came around at a high rate of speed and they observed that the front of the vehicle dipped and the rear rose, leading them to the conclusion that the vehicle was attempting to stop rapidly and that it "planed off" and continued towards them. The Neon, with its

two occupants, struck the marked RMP on its front left fender and the blue van. The Neon was, at that point, immobilized.

Trainor explained that “they” had the Respondents show them where they went. Trainor marked as J1 as the position Respondent Joyner went to at the front of the RMP where he stayed for a few moments. He then proceeded to the front of the Neon, which Trainor marked as J2. He also marked an “O” for Respondent Owens’ position at the front of the Neon. Trainor noted that Respondent Owens had said he was at the back of the RMP. He noted the position at the rear of the RMP where Respondent Joyner crouched and fired as J3. Trainor explained that Respondent Owens was behind Respondent Joyner and they fired in an easterly direction. Trainor also marked as “Z” the zone of safety with a broken red line.

On cross-examination Trainor agreed that he has done about 200 firearm discharge evaluations. He agreed that when he had all the evidence, he and the case investigator sign off on the final report. He stated that in this case they found that the two Respondents were outside the guidelines because they shot at a moving vehicle. Upon reviewing the report Trainor agreed that he used the term “fleeing vehicle.” Trainor agreed that he wrote that, and said that the ballistic evidence revealed that after the Respondents had successfully removed themselves from the path of the fleeing vehicle, they continued to fire at the vehicle after it had passed them.

He did not agree that he found that the officers had a right to shoot at the vehicle when it was right at their position, but that ballistic evidence indicated that they fired after the vehicle passed them, stating, “That is not entirely true counselor.”

He agreed that shots were fired at the vehicle when it was alongside the officers. When asked, "In fact there is really good ballistic evidence of this because all the shell casings six shell casing³ I believe are found right here in this general area meaning by B3 and B5?" Trainor agreed.⁴ Trainor also agreed that that would indicate that is the location where the shots were fired.

Trainor testified that two pieces of ballistic evidence that were recovered suggested that the Respondent fired after the vehicle passed in a northbound direction. He noted the bullet impact in the rear left tail light of the Neon.

Trainor agreed that there is no way to know the sequence the shots were fired in and that there is no sound or audio. He agreed that there was no way of knowing if the shot into the tail light had occurred near B7 on the map (about one car length) or where it is marked 30 feet (more than five car lengths).

Trainor was asked if it were possible that the shots could have happened in a continuous sweep. Trainor answered that the crime scene examination would show the trajectory of where the tail light was entered, but he agreed that the trajectory was not shown on the diagram but it would appear in the crime scene photographs which he agreed had not been produce in Court.⁵

On questioning by the Court, Trainor stated that a total of nine shots were fired, five by Respondent Joyner and four by Respondent Owens. He then acknowledged that he had it backwards.⁶ Trainor agreed that the guns were examined after the shooting and

³ A total of nine shots were fired.

⁴ As illustrated on DX 1, this is an area near the rear of the RMP near the position for Respondent Joyner marked J3.

⁵ As will be seen, this was incorrect and the photographs were present in Court.

⁶ The allegation is that Joyner fired four rounds and Owens fired five.

each was capable of firing 16 rounds and that live rounds were found in the magazines.

He agreed that the Respondents, at some point, made a determination to stop firing.

Trainor agreed that one of the perpetrators was apprehended almost immediately, while the other wasn't found for another half an hour, and no one knew where that perpetrator was for that period of time. Trainor also agreed that "no one knows whether he had a weapon or two weapons or three weapons, four weapons that he disposed of before he was apprehended." Trainor acknowledged that, "The fact crime scene didn't recover a weapon doesn't mean that there was no weapon just means that they didn't find one" as a "very true statement." Trainor also agreed that both Respondents, at their official Department interviews, indicated that they saw the driver making arm motions consistent with having a weapon. He also agreed that Lieutenant Rafferty testified that he started the chase because he saw the two perpetrators making furtive movements in the car and that is what led him to further investigate and in fact pursue them. Trainor agreed that not only did the Respondents think the perpetrators' movements were suspicious but the lieutenant who started the event thought their movements inside the car were suspicious as well.

Trainor agreed that the Respondents were in uniform, in a marked car with lights attempting to stop a perpetrator. He agreed that despite all of their symbols of authority the perpetrator tried repeatedly to squeeze through their car and the parked van. He also agreed that the Respondents repeatedly commanded the driver to stop and obey police authority and that the perpetrators had no intention of complying with police orders and cease the illegal activities. When asked if these factors would cause a reasonable officer

to believe that they had a dangerous individual on their hands, Trainor responded, "you can construe it as that."

When asked, "Not only did we have all those things but we had the arm movements not only these officers saw but the lieutenant saw that he would initially lead them to believe that these individuals may very well have a weapon?" Trainor responded, "That is their testimony."

Trainor did agree that it was "absolutely correct" that the Respondents had every reason to believe that the two perpetrators wanted to do the Respondents harm.

When asked, "Given all that if you believe their testimony that they saw an arm movement and a dark object, which is their testimony, in the car they have every reason to fire a weapon?" Trainor responded, "I disagree in that only in that it was based on the officers' own testimony in trying to help me understand what they could actually see in the car what to determine there was not a weapon they didn't take that extra step based on their body positions what they had seen the didn't take that extra step to see what that object was."

Trainor agreed that there is no requirement that an officer actually see the weapon before he fires his weapon. He also said he believed it was correct to state that if all the surrounding circumstances lead an officer to reasonably believe that a weapon is about to be used on him or his partner that officer is clearly entitled to fire. Trainor agreed that an officer can continue firing until the threat is eliminated and that it is as valid to protect a partner as himself.

Thereafter there was the following exchange:

Q. And in this case the gist of the Department interviews that Officer Owens indicated that because of the exposed position of his partner he

shot at the individual, not the car, at the individual to protect his partner Officer Joyner; is that a fair statement?

A. Which was the violation.

Q. He shouldn't have shot to protect his partner?

A. The Patrol Guide clearly states in subsection G that you are prohibited from firing at a moving vehicle unless deadly physical force other than the moving vehicle is being used against you.

Q. Correct and Officer Joyner's testimony is that he also believed that this individual to be possessing a dark object I believe Officer Owens used the phrase dark object; correct?

A. A dark object.

Q. And because he saw this dark object and an arm movement of the perpetrator if I recall his testimony he didn't fire at the vehicle, he fired at the driver of the vehicle the man making this -- possessing this object in order to protect Officer Joyner who was more exposed; isn't that his testimony?

A. His testimony they certainly both asserted they were shooting at the driver, they never said they shot at the vehicle. However, it was Officer Owens saying he fired because his partner his own words if I recall that correctly was that he was firing at the car what he was firing at because he was afraid Officer Joyner was going to get hit.

Q. Okay, either by the weapon or by the car?

A. It was a -- by the substance of his testimony was by the car.

Q. But there is no doubt that Officer Owens said he saw a man he saw the driver possessing a dark object in his hand?

A. That is what we reviewed many times in the interview.

Q. According to his testimony he fired at the driver that possessed that, not the car, he fired at the man with the object?

A. That was his testimony.

Trainor agreed that at the time the perpetrator's vehicle was stuck it was perfectly reasonable for these two uniform officers to believe that they were there to apprehend the

perpetrator. He further agreed that they would have to approach the vehicle and extract the perpetrator to prevent him from doing more damage to anybody. Trainor also agreed that the Respondents said that at some point they were trying to get the door open to get the driver out. When asked, "Would you agree with me that in order to apprehend the driver of a vehicle you have to make an approach to the door and leave your zone of safety?" Trainor responded, "In a safe manner." Trainor further stated:

Based on their testimony Officer Joyner went to the driver's door initially to extract him and then left that reasonable area where he was extracting someone from a door and went to the front of the vehicle even though the vehicle is attempting to move forwards backward and forwards. I don't know how he would have been able to extract him.

Trainor said he could not say why Respondent Joyner went to the front of the vehicle but he agreed that Respondent Joyner said he went to the front to point his firearm at the driver to get him to stop and that he "presumed" that was so. He agreed that it might be a way to stop the driver, "albeit a poor one."

Trainor indicated that there was one bullet impact on the rear of the vehicle and three on the side. There was another impact on a vehicle with Massachusetts plates in a northeasterly direction at 509 Vermont Street.

Trainor was also asked about the hit ratio⁷ of the average police officer at ten feet, and said he would not be surprised if it was "somewhat less than" fifty percent. He acknowledged that the hit ratio was not as high as "we" would like it to be and agreed that the reason officers are taught to shoot for center mass is because that is the biggest target.

⁷ The percentage of shots fired that hits the intended target.

On questioning by the Court, Trainor said that there were some material on trajectory and that in reviewing the case folder and looking at the crime scene photos and a crime scene sketch, there was information about the trajectory of the round that went into the car. He said the Crime Scene Unit used a stick to show the path of the bullet. Trainor also testified that there were nine round fired, four from Respondent Joyner and five from Respondent Owens. He further testified that when the rounds were analyzed it could not be determined whose went where. He indicated that he knew where five of those nine rounds went. He stated that one bullet left an impact mark on the left front tire and that there were two bullet impacts on the left rear tire.⁸ He also said one hit the rear left tail light of the Dodge Neon. The last round, he said, was recovered from a vehicle parked in between houses at 513 and 509 Vermont Street. He reasserted that he had no accounting for any of the other rounds.

At this point the Court asked if he had the photographs with him and he said, "no." As the Court was about to ask why the file was not in Court, the Advocate volunteered that she had the pictures. The photographs were then handed to Trainor who, at the Court's request, selected photographs that depicted the known shots. There were eight such photographs. The photographs were then entered into evidence as Court's exhibits. Court Exhibit (CX) 1, was a picture of the left front tire. CX 2 depicts the rear rim off of which two bullets ricocheted. CX 3 was the rear tail light and open trunk of the Neon. CX 4 was the parked vehicle between 513 and 509 Vermont Street. CX 5 was a rear view of the Neon. CX 6 was the interior trunk of the Neon. CX 7 was a rear view

⁸ This is incorrect. As can be seen from the crime scene photos (shortly to be put in evidence) the round that hit the tire penetrated it leaving a hole. The two that hit the rear wheel, hit metal and left indentations.

of the parked vehicle with a portion of the bumper removed. CX 8 was a close up view of the left rear wheel of the Neon.

The Court then qualified Trainor as an expert witness regarding crime scene investigations of shootings.⁹ The Court then asked a hypothetical question: "If an officer was confronted with a situation where someone in a vehicle, a moving vehicle was pointing a gun at them would they be within guidelines to use their weapon, their gun to shoot at that person?" Trainor indicated that if the person inside the vehicle had a weapon "they would be a hundred percent justified in discharging a weapon."

The Court then asked a second hypothetical question: "If the person in the vehicle had something that appeared to be a weapon holding it in a manner that appeared to be a gun would they be justified in using their weapon?" Trainor responded that that is a difficult question to answer given the limited facts. When asked why he said that, Trainor explained:

I say that because we would have to take into the totality of the position of the officer his -- the lighting conditions what he sees, the time he has to react to that, if there are any available options to the officer what really clearly to get to what the object is and how the officer was to explain in what they saw.

If the officer was to articulate again hypothetically speaking Commissioner if the officer was to come in and depict an object that was shaped like a firearm colored like a firearm the sands of credibility would lean toward the officer in when we review this case just merely an object in the persons hands when we look at that you know using a hypothetical situation we look at the totality of the scenario they're in plus you know, whatever information is available to the officer and our belief that the officer has that extra responsibility to determine as best he or she can to do the best job they can in every case by case basis to determine whether something is in fact a weapon that can be used.

⁹ There was no objection by either counsel to this.

Trainor agreed that at the time the officers were confronted with the driver whose car was wedged between two vehicles, and was moving it back and forth to dislodge himself, the Respondents had a responsibility to take some action. He agreed that it would be an appropriate option to point their gun to get the driver to stop.

Trainor went to the diagram (DX 1) to explain the incident. He noted that diagram shows the path of the flattened tire after it was struck. He said that the officers were firing in an eastbound direction going into the vehicle with Massachusetts plates. He indicated that even though he was not a ballistics expert the trajectory into the rear of the Neon had to be much further away. He indicated that that shot was almost northbound, but that he could not say with absolute certainty where the vehicle was.

He again asserted that it is unknown who fired the shot into the the vehicle with Massachusetts plates. He indicated that the bullets fired to the rear wheel were fired in an eastbound direction.

Trainor indicated that the officers stated that all of their shots were in succession and that they did not recall pausing. They recalled firing all the rounds from the same spot. He said that because Respondent Joyner was jumping out of the way when the Neon emerged into view, it is believed Respondent Owens fired the first shot. He reaffirmed that all the shots were made from the safety zone.

On re-cross examination Trainor reaffirmed that he believed the Neon was up the block when it was shot in the rear. He agreed that both officers said they fired from a low or crouched position. He indicated that the crouched position would be even with the bumper and he agreed that the shots in the tire are low as well. He agreed that the shots were consistent with them being crouched.

Trainor noted that they did not recall any pause in the shooting. Trainor was asked, "Again you can't discount the hypothetical that I just gave you, which is that they are firing continuously in a matter of a second or less than a second as the vehicle goes past they wheel and that last shot hits the rear you can't discount that?" Trainor responded, "You can't discount that." He was then asked, "And there is no evidence in this case that could discount that?" to which Trainor responded, "Not that I am aware of."

Trainor agreed that he had said that all of the shots were fired from the safety zone. He also agreed that that was a safety zone from being hit by the car. When asked if the safety zone would protect them from a weapon, Trainor said, "That would open them up to some sort of liability." Then he agreed that the safety zone would only protect them from the car. On questioning by the Court, Trainor agreed that when he said safety zone he was talking about a place where they could avoid being hit by a car but not avoid being hit by bullets.

The Respondents' Case

The Respondents testified on their own behalf.

Respondent Jonathan Joyner

Respondent Joyner has been a police officer for five and a half years, doing mostly patrol. As of January 26, 2008, he had been in the 75 Precinct for about two years. On that date he was working with Respondent Owens, who was his steady partner. They had been working together for 7 or 8 months. On that day they were in uniform, in a marked RMP. He was the operator of the RMP.

Respondent Joyner saw a silver car run a steady red light and being operated in an aggressive manner. A dark colored Impala, which he believed was an unmarked police car, was pursuing the silver car. He turned on his lights and he and Respondent Owens decided to assist. He did not have radio communication with the Impala. He observed the two cars turn on Wyona Street, and he turned the RMP right before Wyona Street, at Vermont Street, where they went down the wrong way with the RMP's lights on.

In explaining why he turned down Vermont Street, Respondent Joyner said, "Well, you know, it's kind of a pattern. The perps they kind of do the same thing all the time over and over again." He agreed that based on his experience on patrol he felt that the likely route the perpetrators would take would be Vermont Street.

He stopped the vehicle close to the corner where the blue van was. The Respondents remained in their RMP and got out after the Neon struck it. Respondent Joyner indicated that the driver of the Neon, "he got some speed up because he did slow down and start back accelerating."

After the RMP was struck, he said Respondent Owens jumped out of the car on the passenger side and, "I went right behind him out of the car on the passenger side." Respondent Joyner said he started moving towards the front of the RMP on the passenger side but he didn't quite get to the front. The driver was moving the car around so he and his partner decided to go the other way.

Referring to DX 1, he said he went to a position near the J2 mark Trainor made on the diagram. Respondent Joyner indicated that he was not actually at J2 but "more towards our RMP." He saw that the driver of the Neon was "not giving up the gas" so they moved back. He noticed that the driver wasn't trying to stop his car and that he was

going back and forth, so it wasn't a good idea to go up to him and apprehend him. He distanced himself from the car.

He said they moved back to a position near where Trainor had marked J3 on the diagram but closer to B5 (J3 is right at the rear of the RMP, B5 is several feet to the north). At this point the perpetrator "started to actually break free and his car actually got out eventually and that's when I jumped out of the way."

Respondent Joyner indicated that at first he approached the vehicle with the idea of getting the individual out, but then the driver started to move the vehicle until it wasn't stuck and that is when Respondent Joyner jumped out of the way.

Respondent Joyner described the movement of the driver's hand: "He was driving with his I believe it was his left hand and his right hand was coming over in a motion like that you know looking over at us." While he said that, Respondent Joyner made a motion that was described as a straight arm out the window over his left arm. Respondent Joyner testified that he believed the driver was aiming at him with a firearm. "At that point, this was after he moved, at that point, I discharged my firearm." He found out later that he had discharged four rounds. He has no idea where the rounds hit. Respondent Joyner stopped firing when the threat was over: He said that when he stopped firing the driver was "already gone" and that he (the driver) was past him.

Respondent Joyner testified that the gun was fully loaded and, if he wanted to, he could have fired 16 rounds. He denied ever taking a shot that was straight at the fleeing vehicle. He said there was no pause in his firing.

He does not know whether, in fact, the perpetrator had a gun but he stated, "I still believe he had one."

On cross-examination Respondent Joyner agreed that he was not requested to assist the unmarked vehicle but decided to anyway. He acknowledged that he was inside the RMP when it was hit, and that after it was hit, he got out of the car. Respondent Joyner agreed that at some point he saw movements within the Neon and that the driver had his left hand on the steering wheel and his right hand was coming over.

He did not recall if the Neon was rocking back and forth at that time, as he was trying to exit his vehicle, so his back would have been to the Neon. He agreed that he stated that the driver pointed what he believed was a weapon. Respondent Joyner testified, "I couldn't make it out to be a weapon, an actual gun, but I believed it was at that time, I thought it was a gun." Respondent Joyner indicated that it was light outside, daytime, approximately 11:30 in the morning.

He agreed that he never yelled, "gun." When asked if he ordered the driver to put his hands where he could see them, Respondent Joyner stated: "We yelled out various verbal commands to gain compliance, police, don't move, maybe I might have asked him to stop let me see your hands, I might have asked that, it was two years ago."

When asked if the driver fired at or towards him, Respondent Joyner answered: "Not that I know of." He did not put over the radio that he believed there was an armed perpetrator. He did not get hit by the vehicle outside of the RMP. He said he did not fire at the Neon after it passed him.

Respondent Joyner stated that his partner did not yell, "gun."

On re-direct examination Respondent Joyner testified that after the vehicle drove off, he was directed by the lieutenant from the unmarked car, who initiated the pursuit,

Lieutenant Rafferty, to continue the pursuit. Respondent Joyner said Rafferty came up to him and said something like, "get him" or "let's get him."

Respondent Joyner then got back into the RMP, made a U turn and went north on Vermont Street. He said the Neon crashed further up the block. At that point they apprehended one perpetrator, the passenger, and "then it became a manhunt for the other guy."

On questioning by the Court he reaffirmed that the passenger was apprehended and that the driver got away "for quite some time." He testified that he and Respondent Owens were at Jamaica Hospital when they heard that the driver had been arrested about 30 minutes later.

Respondent Joyner testified that he encountered the Neon near the corner when the Neon hit the RMP. He was not able to get out on the driver's side and he got out by climbing over to the passenger door. At that time, Respondent Joyner testified, the driver was doing a lot of moving as though he was reaching for something in the car.

When he got out of the car, Joyner stated:

We started to walk towards the front, I started moving towards the front he was still his is moving the car around so I decided to go around the other way. At that point he was moving the car, he was still moving the car and he was making an attempt to come forward that is when I decided to make a retreat back.

Respondent Joyner indicated that when he shot he was closer to B5 on the diagram (DX 1) "over there closer to the car." His body position was down toward the ground, "more towards crouching." Respondent Owens, he said, was a few feet to his right.

Respondent Steven Owens

Respondent Owens has been with the Department six and a half years, mostly on patrol. He has been in the 75 Precinct his entire career. At the time of the incident he and Respondent Joyner had been partners for 7 or 8 months. On the day of the incident he was the recorder. He described Respondent Joyner's testimony about the incident as "absolutely accurate."

Respondent Owens testified that when he and Respondent Joyner saw the pursuit they discussed the matter and decided to go up Vermont Street the wrong way, and went all the way down the block using lights in a marked RMP. They got out of the vehicle after it was struck. Respondent Owens testified that he was able to get out of the vehicle on his side and that he exited the vehicle after it was hit because he was concerned for his safety. He was concerned at that time that the perpetrator might take a shot at him. After he got out, he moved to the front of the vehicle, for safety.

Respondent Owens testified that at one point he reversed around the car. He stated, "Just this whole time the perpetrator he is going back and forth. I am looking through the driver's side window and it appeared to me that he had a firearm." When asked what made him think the perpetrator had a firearm, Respondent Owens stated, "His motion, not taking heed or listening to our commands, verbal commands, please don't move."

Respondent Owens agreed there was no doubt the perpetrator could see that they were in uniform. He said then he did try to get near the vehicle to get the perpetrator out. This was when the vehicle was lodged between the van and the RMP. Respondent

Owens stated that he was not successful because the Neon broke free by pushing the van up on the sidewalk.

Respondent Owens testified that when the Neon broke free, "At that point I observed my partner, Officer Joyner, in a line of fire in front of the vehicle as the perpetrator was extending his hand out as if he was going to take aim at my partner." He testified that he discharged his weapon at that point.

Respondent Owens testified that he fired five rounds, that his weapon was fully loaded, and that had he wanted to, he could have fired 16 rounds. He stopped firing, he testified, when the vehicle was not a threat any more, which was as soon as it passed.

Respondent Owens testified that he fired the shots to protect himself and Officer Joyner. He stated that the shooting was continuous, without pause.

Respondent Owens was asked to use the diagram (DX 1) to show where he was at the time he fired his weapon. He pointed to the B1, B3 area (on the passenger side of the RMP near the rear of that vehicle). Owens testified that he did not actually see a gun in the perpetrator's hand but he did see an object in his hand that he believed to be a firearm. He testified that he fired at the perpetrator and not at the vehicle and that he did so from a squatting position. He does not know where any of his shots hit.

Respondent Owens agreed that Lieutenant Rafferty came on the scene and directed them to pursue the Neon, so they turned the RMP around and drove up the block. He agreed with Respondent Joyner that the perpetrator was arrested a half an hour or more later.

On questioning by the Court, Respondent Owens confirmed that the person arrested down the block was the passenger of the Neon.

On cross-examination Respondent Owens agreed that he was inside the RMP when it was hit and that he got out right away and unholstered his weapon when he exited the vehicle. He pointed his weapon at the driver of the Neon. He noted that he was in full uniform, in a marked RMP, yelling commands at the driver.

Respondent Owens agreed that the driver started to point what he believed was a dark object at him and he interpreted the object as a weapon. He agreed that he did not actually see a weapon. He could not recall "a hundred percent" if he ordered the driver to put his hands where he could see them and he noted that there were other officers at the location also yelling commands such as "police, don't move, stop the vehicle." He did not know the names of the other officers but it was the lieutenant and two other officers with him.

Respondent Owens agreed that the driver never fired at or towards him. He did not radio that he believed there was an armed perpetrator at his location. He agreed that at some point the Neon started rocking back and forth. He agreed it was at that point that he retreated to the back of the RMP. He agreed that he retreated as the Neon started to break free and he wanted to get out of the way. He also agreed that he did not shoot at that time.

FINDINGS AND ANALYSIS

The facts of this case are not in serious dispute. Indeed the conclusions reached by the Department's sole witness, Trainor, are based largely upon statements made by the Respondents about the incident.

On January 26, 2008 the Respondents were in uniform and on patrol in a marked radio motor patrol vehicle (RMP) in Brooklyn's 75 Precinct. Respondent Joyner was the operator of the RMP. While on patrol they observed what appeared to be a police chase in which a silver Dodge Neon was being pursued by a black sedan with lights. They later learned that in that car were a lieutenant, Rafferty, and two officers. Being familiar with the area, the Respondents determined that the fleeing vehicle would probably turn north on Vermont Street. They, in essence, headed the vehicle off, by going to Vermont Street and turning south against the flow of traffic. As they proceeded up the block the wrong way they used their police emergency lights.

As they neared the corner of Dumont Avenue, the Neon turned onto Vermont Street, headed north. According to the diagram placed in evidence by the Department (DX 1), the RMP was near the center of this one way street with a car parked on the west side of the street and a van parked on the east side, slightly closer to Dumont Avenue.

The driver of the Neon attempted to drive between the RMP and the van and became lodged between those vehicles. Both Respondents exited out of the passenger side of the RMP. Respondent Joyner went to the front of the RMP. While this was going on, the driver of the Neon was attempting to dislodge himself by moving the vehicle back and forth.

As Respondent Joyner was unsuccessful in that position to get the driver to obey verbal commands to stop, he went around toward the rear of the RMP. Respondent Owens also went toward the rear of the RMP, then to a position near the front of the Neon, not directly in its path, but off to the side, close to the left (driver's) side, near the rear quarter panel of the RMP (see the "O" marked on the DX 1 by Trainor). Respondent Owens became concerned that the driver had a gun and re-positioned himself on the other side of the RMP near the rear, right side of that vehicle. Respondent Joyner stepped out in front of the Neon, took an aiming stance and pointed his gun at the driver. There were apparently numerous verbal commands from both Respondents as well as other officers on the scene, ordering the driver to stop.

The driver finally succeeded in dislodging his vehicle by pushing the front of the van sideways onto the curb. Respondent Joyner jumped out of the way and positioned himself to the rear of the RMP.

It is at this point that Respondent Joyner claims he saw the driver hold the steering wheel with his left hand, while he moved his right arm across, pointing the dark object in his hand towards the window. Respondent Joyner testified that he believed that the driver had a gun in his hand and at that point he began to fire at the driver of the Neon. Respondent Owens also claims he saw what he believed was a gun being aimed at his partner, by the driver of the Neon, when he began to fire.¹⁰

The Neon proceeded down the block and collided with a parked car. The Respondents, with the encouragement of Rafferty, who had been part of the initial chase, turned the RMP around and continued their pursuit. The passenger was apprehended

¹⁰ Trainor surmised that Respondent Owens fired first because Respondent Joyner was in the process of jumping out of the way of the Neon.

immediately. The driver escaped but was captured by other officers about a half an hour later. No gun was recovered.

Both Respondents started with fully loaded hand guns which were capable of firing 16 rounds. During the incident, Respondent Joyner fired four rounds and Respondent Owens fired five. The investigative team was only able to account for five of the nine rounds fired. One hit the Neon's left (driver's side) front tire. Two hit the rim of the left rear wheel. One hit a vehicle parked across the street and slightly to the north of the point where the Respondents fired their weapons. A fifth round entered the rear of the Neon: It penetrated a tail light and headed into the trunk of the vehicle. The Department did not identify which round came from which gun.

The Advocate put the theory of the Department's case forward very clearly in her opening: "Police Officers Joyner and Owens violated the Patrol Guide when they shot at a moving vehicle in the absence of any other deadly force beside that moving vehicle." The Advocate also noted that neither a gun, nor anything that appeared to be a gun, was recovered.

The Respondents contend that they believed it was a gun that they saw, and that it was not recovered because the driver was at large for about a half an hour between the incident and his apprehension, which gave him ample opportunity to dispose of it. Further they contend that they were not firing at the vehicle but at the driver who was threatening the use of deadly physical force against them.

In making its determination, this Court is limited to the facts put in evidence during this proceeding. The Advocate called one witness, Trainor. While Trainor is knowledgeable about the investigation he did not respond to the scene on the day of the

incident. Although he was in telephone contact, he did not actually begin work on the matter until his regular tour two days later. Consequently his entire testimony was hearsay. No forensic evidence was offered by the Department and indeed the only such evidence before the Court is found in the pictures of the rear tail light and open trunk of the Neon where the path of the bullet was marked with a rod. These photos were received in evidence on motion of the Court as CX 3, 5 & 6. Nonetheless, the Advocate has assured the Court that it has presented "all information necessary to prove this case."

Before dealing with the main issue outlined above, there is one secondary issue that should be addressed. In her opening and closing statement, the Advocate suggested that Respondent Joyner put himself in harm's way and somehow caused the incident by standing in front of the Neon. In her opening, she asserted that "Police Officer Joyner put himself in the position that caused him to fire his weapon and Police Officer Owens who was behind the radio motor patrol car when he shot his gun." She revisited the argument in her closing statement: "...Police Officer Joyner placed himself in front of the Neon creating a situation in which he had to dive out of the way when the Neon started to move thus leaving him to make the decision that he had to shoot his firearm."

There is no charge related to Respondent Joyner's action in placing himself in front of the Neon. In point of fact, the Department's witness, Trainor, agreed that there was no violation of Department rules in Respondent Joyner's pointing his gun at the driver. Whether it was the best possible tactic or not, it was an act clearly designed to get the attention of this driver and convince him to obey a lawful order to stop and surrender. Moreover, Respondent Joyner seems to have left himself enough space to get out of the way in time. There is no reason that this Court can see to blame this incident, or any part of it,

on Respondent Joyner's action in standing in front of the vehicle in an effort to effect lawful police action under very difficult circumstances.

This then brings us to the first major issue, which is whether any of the shots were justified and within guidelines. Patrol Guide Procedure No. 203-12 paragraph g, which is charged in the case, reads as follows:

Police officers shall not discharge their firearms at or from a moving vehicle unless deadly physical force is being used against the police officer or another person present by means other than a moving vehicle.

The Respondents have testified that the driver had what they believed to be a gun in his right hand which he was pointing at them. Trainor testified that this was not sufficient and that they had to be certain it was in fact a gun that was pointed at them. Trainor provided no authority for this proposition and indeed conceded that there is no requirement that an officer actually see the weapon. The test, he agreed, is the reasonableness of the officer's belief that a weapon is about to be used against him or a fellow officer.

There is ample reason to believe that the driver of this vehicle did have a gun. For one thing he was engaged in desperate and vigorous acts to avoid apprehension. He was involved in a police chase. When he saw the Respondents' vehicle blocking his path he rammed his vehicle into the RMP and a van. He then rocked the vehicle back and forth violently and pushed the van onto the sidewalk. Certainly all of this conduct would lead the officers to believe that he might well be in possession of a gun.

Additionally, the motion of the hands described by Respondent Joyner certainly give the impression that the driver was in possession of a gun as he was steering with his

left hand and pointing the object at him across his chest and out the side window with his right hand. Respondent Owens also claims to have seen the driver taking aim.

All of these factors make the Respondents' belief that there was a gun quite a reasonable belief. Additionally, the hand movements coupled with the other conduct led to the reasonable belief that the driver was about to use that deadly force against them.¹¹

The Advocate's repeated assertion that the fact that no gun was recovered is proof that the driver actually had no gun ignores salient testimony which was not disputed at this proceeding. The driver was at liberty after the incident for approximately half an hour. That would have given him more than enough time to dispose of a weapon. Even Trainor agreed that the fact that no weapon was recovered by crime scene investigators is not proof that no gun was present.

Further, the chase started when the lieutenant saw movements that made him suspect the two people in the car had a gun or guns. Respondent Joyner testified that he still believes the driver had a gun and this Court can see no reason to question that belief.

There was much testimony from Trainor that the Respondents were in a safety zone. It was not until near the end of the trial that it became clear that what Trainor was referring to was that they were in a zone that was safe from assault by the automobile. This presupposes that the automobile was the weapon that the officers were concerned about. Looking at the diagram, it is clear that they would not have been in a safety zone from gunfire, which is the danger the Respondents credibly testified was their concern.

¹¹ Patrol Guide Procedure No. 203-12 para. (a) provides, in pertinent part, that: "Police officers shall not use deadly physical force against another person unless they have probable cause to believe the must protect themselves or another person from imminent death or serious physical injury. " While the Respondents are not charged under para. (a), the Court notes that if the Respondents reasonably believed that the driver had a gun and reasonably believed he was about to use that deadly physical force against one of them, then they, of necessity, had "probable cause" as outlined in that section of the Patrol Guide.

Trainor mentioned “cover” in passing. While the Department did not present any rule that an officer must seek cover, in the interest of completeness this Court gave consideration to the issue, whether the Respondents could have avoided using their weapons by seeking cover. Respondent Owens claimed he fired from a position on the passenger side of the RMP which afforded him some cover. He claims he was firing to protect his partner, Respondent Joyner.

The issue then becomes whether Respondent Joyner could have taken cover and avoided the need for either officer to fire. Had Respondent Joyner moved to the passenger side of the RMP, near Owens, it would have given him some cover but then both officers would still have been exposed to gunfire had the driver pointed the gun back toward them after he passed. The only fully effective cover was on the sidewalk, behind the parked vehicles to their back. Given the rapidly moving events it does not seem to have been possible for Respondent Joyner to get to either of these locations in a timely manner.

It now becomes necessary to examine what is known about the shots that were fired. Of the nine rounds discharged only five are accounted for. There is no testimony as to the sequence of these shots and no way of knowing where in the sequence the missing four shots would fit. Having said that, the Court will deal with the shots by number, for identification purposes.

The first accounted-for shot entered the Neon’s left (driver’s side) front tire, flattening it. The second and third identified shots hit the alloy wheel of the left rear tire. This Court is satisfied that these shots can be explained as efforts to shoot the driver that simply missed.

The remaining two identified shots are more problematic. The fourth identified shot entered the rear bumper of a vehicle parked on the sidewalk facing west and somewhat north of the RMP. Counsel for the Respondent has argued that this shot was a small deviation in the Respondents' effort to shoot the driver. Given the distance north it could be argued that any shot fired at that angle was fired after the danger had passed, but it is not crystal clear that that would have been the case. There is simply insufficient evidence to establish whether or not this is a shot at the fleeing vehicle or a shot at the driver that missed its mark.

There is however no ambiguity about the fifth identified shot. That shot entered the rear of the Neon. It appears to hit at a point at the bottom of the rear left tail light and went straight into the trunk of the Neon, with a trajectory that was almost straight toward the front of the vehicle. This shot would have had to have been fired in a northward direction virtually parallel with the line of Vermont Street. It could not have been the result, as counsel for the Respondent has suggested, of a series of shots fired toward the east or some eastward angle.

Looking at the diagram (DX 1), it is clear that such a straight forward direction of fire into the Neon could have been accomplished in one of two ways. Either the shooter moved westward, positioning himself directly behind the car, or the car moved eastward putting itself directly north of the shooter. The Respondents deny moving and the recovered shell casings tends to confirm that they remained in their position behind the RMP. The diagram (DX 1) also has what it describes as "acceleration marks," which show the northward path of the Neon in which it veered eastward. For the shot to have lined up with the car it would have had to have been well down the block.

In either event, but more particularly in the second possible scenario, the danger would by then have clearly passed. The evidence suggests that the shot that went into the tail light of the Neon was not justified and was in fact a shot at a fleeing vehicle, which is prohibited.

Thus it would appear that both the Department Advocate and Respondents' counsel have oversimplified the matter. Some of the shots were justified but at least one and possibly two were not. The problem now becomes one of evidence. Trainor testified that he was unable to tell which shots came from which gun. Certainly, the bullets that appear to have ricocheted off the rim would have been greatly deformed if they were recovered. But the bullet that penetrated the rear light and which appears to have ended up in the trunk of the Neon might not have been significantly deformed. No forensic evidence was presented to explain why identification was not possible and we are left with a situation in which it is impossible to tell, based on the evidence before this Court, who fired shots four and five.

This Court is aware of no way in which both Respondents can be held responsible for what might have been the actions of only one of them. As a consequence, this Court has no alternative but to find both Respondents Not Guilty.

Respectfully submitted,


Martin G. Karopkin
Deputy Commissioner - Trials


APPROVED
JUN 15 2010
RAYMOND W. KELLY
POLICE COMMISSIONER